Supreme Court, U.S.
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UNITED STATES SUPREME COURT

OCTOBER, 1994, TERM

VERMILION PARISH BUS DRIVERS AND
OPERATORS ASSOCIATION and
JEFFREY J. FAULK, SR.,
Petitioners

VERSUS

VERMILION PARISH SCHOOL BOARD, ET AL,
Respondents

ON PETITION FOR WRITS OF CERTIORARI AND
MANDAMUS TO THE UNITED STATES COURT
OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRITS OF CERTIORARI AND MANDAMUS

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QUESTIONS PRESENTED

1. Where state law requires a state agency to conduct a public and plenary hearing before imposing discipline on or discharge of an employee, can a federal court sanction a lesser and different hearing without denying the employee's constitutional liberty?

2. Is speech by the president of a labor union delivered publicly to a state political body, protesting that body's abuse of power which is harmful to the union members, a speech of public concern or a speech of private concern?

3. Where a state agency illegally imposes sanctions upon its employee, does the threat of further sanction, if the

employee seeks judicial redress, or reversal, constitute a violation of the employee's constitutional liberty?

PARTIES TO THE PROCEEDING

A. Petitioners

1. Jeffrey J. Faulk, Sr.
2. Vermilion Parish Bus Drivers' and Operators' Association

B. Respondents

1. Vermilion Parish School Board
2. Daniel R. Dartez
3. Calvin E. Woodruff, Jr.
4. Anthony J. Fontana, Jr.
5. Kibbie P. Pillette
6. Hampton J. Primeaux
7. Cecil J. Hebert
8. Carroll E. LeBlanc
9. Herman J. Suire
10. Duffy G. Marceaux, Jr.

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OPINIONS BELOW

This is a 42 U.S.C. § 1983 claim instituted by plaintiffs against a public body, the Vermilion Parish School Board, its officers and members filed in the United States District Court, Western District of Louisiana, bearing district court docket No. 92-0922. The district court rendered summary judgment dismissing plaintiffs' complaint and further assigned written reasons for judgment in an unpublished opinion dated September 30, 1993. The depositions, documents, and affidavits presented by plaintiffs at the district court level for consideration clearly established a case contemplated by Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975 (1990). The district court, however, avoided an assessment of the facts presented within the context of Zinermon.

Instead the district court avoided a discussion or a decision of these facts by interposing the decisions of Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) and Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3195 (1984), holding that the defendants' actions was random action and therefore plaintiffs were not denied of a predeprivation hearing. The district court further supported its opinion by denying the existence of evidence clearly appearing of record against the Assistant District Attorney, Calvin E. Woodruff, Jr.

Further the district court erroneously determined that Mr. Faulk's speech, in his role as president of the bus drivers' union, threatening union action against the school board if it did not cease its statutorily-prohibited

hiring practices, was not speech on a matter of public concern.

On appeal, in yet another unpublished opinion, bearing docket No. 93-5434, the Fifth Circuit Court of Appeals affirmed the judgment dismissing plaintiffs' lawsuit. In so doing, however, the appellate court did not decide the merits of the district court's opinion, i.e., it avoided any discussion of Zinermon and the Parratt/Hudson doctrine. Instead, the appellate court applied an inapplicable standard of due process, as enounced in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), eschewing existing and applicable state law predeprivation due process standards, and thereby avoided a discussion of the decision of the district court and the merits of

plaintiffs' claims. The appellate court also avoided a determination of the merits of plaintiffs' claims against Assistant District Attorney Woodruff, adopting a statement of the district court that plaintiffs presented no documentary evidence to support their claims against Woodruff. By disclaiming the existence of plaintiffs' evidence the appellate court failed to consider and give effect to the factual basis of plaintiffs' claim of First Amendment violation, including the claim that plaintiffs were denied access to the courts as retaliation against plaintiff Faulk for speaking out on matters of public concern within the meaning of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

From these erroneous decisions and both courts' refusal to consider the

affidavits and the School Board deposition, plaintiffs seek a writ of certiorari or, alternatively, a writ of mandamus ordering the lower courts to use the record evidence and evaluate it in light of controlling law.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit rendered the decision complained of on April 28, 1994, and denied Petitioners' timely application for a rehearing on May 26, 1994.

Thus, pursuant to Supreme Court Rule 13, 28 U.S.C. § 1254(1), and 28 U.S.C. § 1651, your petitioners, Jeffrey J. Faulk, Sr. and the Vermilion Parish Bus Drivers and Operators Association seek review of the court of appeals' decision affirming the district court's erroneous and

improperly considered summary judgment and/or a remand of the case for decision upon a proper consideration of the record evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment 1:

Congress shall make no law... abridging the freedom of speech...or the right of the people...to petition the Government for a redress of grievances.

U.S. Constitution, Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Constitution, Amendment 14:

...No State shall...deprive any person of life, liberty, or property, without due process of law;...

42 U.S.C. § 1983:

Every person who, under color of any statute...of any State...subjects...any citizen of the United States...to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law,...

Fed. Rule Civ. P. 56(c):

...The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law....

La.R.S. 14:66:

Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description....

La.R.S. 16:2(A):

The district attorneys of the several judicial districts of Louisiana, other than the parish of Orleans, shall ex officio be the regular attorneys and counsel for the police juries, parish school boards, and city school boards within their respective districts...

La.R.S. 17:158(A)(1):

...each parish and city school board shall provide free transportation for any student attending a school of suitable grade approved by the State Board of Elementary and Secondary Education within the jurisdictional boundaries of the parish or school board if the student resides more than one mile from such school.

La.R.S. 17:492:

Each school bus operator shall serve a probationary term of three years reckoned from the date of his first employment in the parish in which the operator is serving his probation.

La.R.S. 17:493:

A. A permanent school bus operator shall not be removed from his position except upon written and signed charges of willful neglect of duty, or incompetence,...and then only if found guilty after a hearing by the school board of the parish...in which the school bus operator is employed....

B. All hearings hereunder shall be private or public, at the option of the operator affected thereby....The operator affected shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the operator. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

C. If a permanent school bus operator is found guilty by a school board, after due and legal hearing as provided herein, on charges of willful neglect of duty, or of incompetency,...and ordered removed from office, or disciplined by the board, the superintendent with approval of the board shall furnish to the school bus operator a written statement of recommendation of removal or discipline, which shall include but not be limited to the exact reason, offense, or instance upon which the recommendation is based. Such operator may, not more than one year from the date

of the said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter....

La.R.S. 17:500(C)(c) (1990):

At any time a substitute bus operator has been driving a route for more than ninety consecutive school days, the school board shall review the circumstances of the regular operator to be certain that the continued use of a substitute operator is warranted and appropriate.

La.R.S. 23:981:

It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities.

La.R.S. 32:398:

A. The driver of a vehicle involved in an accident resulting in injury to or death of any person, or property damage in excess of one hundred dollars shall:

(1) Immediately, by the quickest means of communication, give notice of the accident to the local police department if the accident occurs within an incorporated city or town; or if the accident occurs outside of an incorporated city or town,

to the nearest sheriff's office of state police station.

(2) Give his name, address, and the registration number of the vehicle he was driving, and upon request, and if available, exhibit his license or permit to drive, to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in the accident.

STATEMENT OF THE CASE

This case, premised in the district court upon federal question jurisdiction, 28 U.S.C. § 1331, presents claims Petitioners brought, pursuant to 42 U.S.C. § 1983, against the Vermilion Parish School Board, its individual members, its superintendent, Daniel R. Dartez. Suit was filed on May 20, 1992, and was amended on August 12, 1992 to include Vermilion Parish Assistant District Attorney Calvin E. Woodruff, Jr, the School Board attorney pursuant to La.R.S. 16:2(A).

Initially, Petitioners sought a temporary restraining order. On June 2, 1992, the district court denied such relief, and in due course, defendants answered the petition. A scheduling conference took place on December 16, 1992, following which on February 2, 1993,

defendants moved for summary judgment. Action on the motion was deferred until Petitioners could complete discovery.

On April 19, 1993, Petitioners also moved for summary judgment on liability. On July 9, 1993, the district court postponed action on the motions until August 10, 1993. Then on September 30, 1993, some five months after the filing of Petitioners' motion for summary judgment, the district court granted the defendants' motion for summary judgment. Plaintiffs appealed this decision on October 22, 1993.

On April 28, 1994, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision in an unsigned per curiam opinion. Thereafter, the court of appeals denied Petitioners' timely-filed petition for

rehearing on May 26, 1994, leading to the instant petition for writs of certiorari and/or mandamus.

Petitioner, Jeffrey J. Faulk, Sr., was a tenured bus driver with over 25 years employment in the service of the Vermilion Parish School Board. La.R.S. 17:492 sets forth that to become tenured, a driver must accumulate three (3) years of uninterrupted service. Achieving tenure provides the bus driver with the right, at his election, to either an open or a closed, executive session hearing on discipline **or** termination. La.R.S. 17:493.

Mr. Faulk also served as the president of the Vermilion Parish Bus Drivers' and Operators Association, and the state bus drivers' association. The

Vermilion Parish association is also a petitioner herein.

Petitioners' (hereinafter Mr. Faulk and/or the Association) claims stem from a series of retaliatory actions visited upon Mr. Faulk due to his representation of the Association as its president. During the course of and immediately following union contract negotiations with the School Board, Mr. Faulk demanded that the board stop its statutorily-prohibited practice of hiring substitute drivers for indeterminate periods of time exceeding ninety (90) days. See La.R.S. 17:500(C)(c) (1990).

The effect of this illegal practice was to deflate the prevailing wage for the bus drivers, dilute the Association's membership because substitute drivers are ineligible for membership in the

Association, and to weaken the collective bargaining strength of this union representing an essential class of public employees. See La.R.S. 17:158(A)(1), providing that school boards are required to provide bus transportation to public school students.

School Board members became incensed that a lowly bus driver would tell them to follow the law. In May 1991, Mr. Faulk was told by defendant board member Cecil J. Hebert that the "board members" were "pissed off" at him. (See Faulk Affidavit, Appendix pp. A-84-85.) The board then began harassing Mr. Faulk in retaliation for his speech against the board's prohibited practices.

In July 1991, Mr. Faulk was suspended from his position for a period of five (5) days as the result of an admittedly false

charge that he had failed to "immediately" report an accident in violation of school policy and the law. This accident occurred on May 1, 1991, just before Mr. Faulk was told of the board's animus toward him, but the retaliation culminated after Mr. Faulk had angered the board members.

Superintendent Dartez admitted during deposition, however, that the "policy" Mr. Faulk allegedly violated was not effective at the time of the accident because it was "never brought before the Board for approval; therefore never handed out." This admission is memorialized in Dartez' own handwritten notes on the proposed policy. (See Dartez Notes, Appendix p. A-100.) Further, Dartez admitted that Mr. Faulk had "immediately" reported the accident when he got home after his route,

because Mr. Faulk was "[p]retty close to, yes, I guess so." (See Dartez Deposition p. 243, Appendix pp. A-104-105.) Mr. Faulk reported the accident only forty (40) minutes after its occurrence, after dropping off his last student, and returning home.

Furthermore, Louisiana statutory law shows that the accident need not have been reported to the police because Mr. Faulk and the other driver agreed that damages did not apparently exceed $100.00, and the students on Mr. Faulk's bus all stated that they had not been injured. See La.R.S. 32:398.

This suspension was also made in violation of Mr. Faulk's right to a tenure hearing as specified in La.R.S. 17:493, requiring as a jurisdictional predicate to such a hearing that the board first lodge

charge(s) against the driver. No such charge(s) were ever proffered by the board, as shown by Faulk's attorney at the time, Howard Martin. (See Martin Letter, Appendix p. A-106.)

Later, on April 2, 1992, Mr. Faulk was again suspended on a fabricated charge, this time that he had slapped an unruly student on January 24, 1992. Superintendent Dartez' own written report to the board depicts the known falsity of the charge: "I would not recommend the convening of a La. R.S. 17:493 Hearing for termination due to legal ramifications arising from the inconsistent testimony. A position supported [sic] the Board's legal counsel who also participated in the hearing process." (See Superintendent's Recommendation, Appendix p. A-118.) That "counsel" was Woodruff. Dartez sought

only a suspension without realizing that suspensions also require § 17:493 hearings, per subsection C thereof.

Dartez' report to the School Board was the culmination of a warped, and undeniably biased "investigation" in which Dartez improperly assembled a contractually-mandated investigative team that was supposed to be composed of two persons appointed by the superintendent and one by the affected driver. The contract further provided that the team report its findings to the superintendent who would in turn make recommendations to the School Board.

Incredibly, Dartez appointed *himself* and his assistant superintendent, Mr. Alleman to two of the three positions on the team hoping their weight on the team would produce favorably skewed findings.

Dartez shamelessly justified this action by stating no more than that the contract did not explicitly prohibit his self-appointment: "it doesn't say I can't." (See Deposition pages 112-113, Appendix pp. 101-103.)

Miraculously, the team reached an inconclusive finding, determining no more than that the unruly student had cursed Mr. Faulk. Yet, Dartez, reporting the "team's" findings to himself in his erstwhile role as superintendent, then falsely *recast* the team's conclusions into the positive statement that Mr. Faulk "did strike Randy Baldridge." (See Team Report and Superintendent's Recommendation, Appendix pp. 111-118.)

All of these and the other illegal and punitive actions challenged in Mr. Faulk's petition are memorialized in the

board's 516 page deposition, largely given by Dartez, and the documents produced pursuant to subpoena during that deposition. This deposition is a self-damning catalog of the sins of these defendants and was introduced into the record in opposition to the defendants' summary judgment motion.

Later, the School Board's counsel, Woodruff, threatened Faulk with termination if he did not acquiesce in and accept his suspension for allegedly slapping the student. This fact, amounting to a denial of Mr. Faulk's substantive First Amendment due process right of access to the courts, was memorialized in the affidavit of Mr. Faulk's former counsel, Mr. J. Isaac Funderburk. (See Funderburk Affidavit, Appendix pp. A-98-99.) This affidavit was

also duly submitted to the district court in opposition to defendants' summary judgment motion.

Nevertheless, the district court did not consider these pieces of evidence, and in fact denied their existence. At pages 11 and 12 of the district court opinion (Appendix pp. A-50-54), Judge Doherty displayed the continuing hostility to Mr. Faulk's claims that inexplicably pre-dated discovery in this case. As Judge Doherty herself declares, she even questioned Mr. Faulk's right to adduce evidence in support of a claim *he knew to be viable*, and this hostility perhaps led her to ignore the evidence Mr. Faulk's was able to adduce. Upon ruling against Mr. Faulk, the district court declared that Mr. Faulk produced "no documentation, affidavits, deposition testimony, etc., to support

their claims against Mr. Woodruff." Id. Yet, in complete contradiction of that assertion, it is seen that Mr. Funderburk's affidavit bears the district court clerk's stamp with the date "May 26 1992;" further, the district court clerk's "exhibit" sheet, contained in the court of appeals record at page 254, shows that the board deposition was in his possession and available to the district court as well to the court of appeals.

Astonishingly, the Fifth Circuit Court of Appeals affirmed the decision of the district court, also declaring that no evidence existed to support Mr. Faulk's claims. This shocking error then permitted the court of appeals to declare a void and then examine Mr. Faulk's claims in that void. Thus, the court of appeals concluded that Mr. Faulk had received all

the due process protections *the School Board* alleged he was due, in accordance with this Honorable Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). This denial also permitted the court of appeals to avoid reaching Mr. Faulk's Zinermon claim, as well as to deny his First Amendment public speech retaliation and denial of access to the courts claims.

In so doing, the court of appeals utterly failed to adjudicate Mr. Faulk's claims on appeal. Had the evidence been acknowledged and considered, the court of appeals would have been compelled to find that Petitioners' First Amendment and civil rights had been trampled, that the facts of this case fell squarely within the purview of this Honorable Court's

Zinermon decision, and that summary judgment in favor of defendants was entirely inappropriate.

These errors lead Petitioners to seek either a dispositive decision of this Honorable Court on writ of certiorari, or a remand of the case to the lower courts on a writ of mandamus for an authored opinion actually examining the record evidence in light of controlling law.

ARGUMENT

1. Where state law requires a state agency to conduct a **public** and plenary hearing before imposing discipline on or discharge of an employee, a federal court commits egregious error in applying a lesser or different predeprivation hearing standard.

Plaintiffs' complaint presents a claim for constitutional protection as to their property and liberty interests, i.e., their property and liberty interests created by state law but deprived by state officials acting under color of state law. Faulk's state-created property and liberty interests stemmed from La.R.S. 17:492, granting him tenure in his position after attaining three (3) years service in his position as a parish bus driver, and La.R.S. 17:493, specifying the exacting type of tenure hearing to which he was entitled when being disciplined or terminated from that employment. The

predicates for such hearings are charges levied by the Board, which was admittedly not done in the case of Faulk's bus accident suspension, and the driver's election of an open, public hearing or a closed, executive session hearing, admittedly denied when Faulk was convicted in absentia in the case of the alleged slapping incident suspension.

The Fifth Circuit Court of Appeals, however, refused to protect plaintiffs' demonstrated property and liberty interests as established by state law. That the appellate court intended not to enforce these interests is made manifest by the following statement of the court of appeals:-

> Appellant's first complaint is that the district court committed egregious error in incorrectly dismissing his Due Process claims because he was denied a pre-deprivation due

process hearing. Appellant's position is that the state statute affords him a more elaborate pre-deprivation hearing that [sic] the minimum "notice and opportunity to be heard" standards dictated by the United States Constitution. He looks to this court to enforce the Louisiana statutory pre-deprivation procedures. For the following reasons, we affirm the district court on this point.

The Fourteenth Amendment requires only that a party "be given notice and an opportunity to be heard."

* * *

Since it is clear that the appellant received both notice and an opportunity to respond to the charges against him before any deprivation or interruption in his right to continued employment occurred, we affirm the district court's judgment on this alleged point of error. It appears that Faulk is complaining about the result reached in those hearings, and for that La. Rev. Stat. 17:493(c) provides an adequate remedy of review through the state court system. Because we find that the pre-deprivation due process was sufficient, we need not address the value of any post-deprivation remedies in light of the Parratt/Hudson doctrine. Court of Appeal

Opinion at pp. 7 - 11 (footnote omitted; emphasis added).

These statements sandwich a lengthy quotation from this Honorable Court's opinion in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), in which this Court decided that the deficient procedural standards surrounding the Parma Board of Education's extension of civil service protection did not limit the reach of constitutional due process.

The Parma Board of Education in Loudermill argued that its employees took their civil service protection subject to whatever procedures they extended in the grant of the civil service protections. 470 U.S. at 539-540, 105 S.Ct. at 1492. In rejecting that argument, this Court explained that where the property right to continued employment was extended, civil

service protections had to meet minimal constitutional standards of due process. 470 U.S. at 541, 105 S.Ct. at 1492-1493.

In Loudermill, the procedures, which provided only for a posttermination administrative hearing and court review of that decision, were found to fall *below* minimal due process requirements, resulting in the imposition of a requirement that a *pre*termination hearing be held. In order to demonstrate that such a requirement would not impose a great burden in the case of such otherwise deficient procedures, this Court explained that such a hearing need not be elaborate. 470 U.S. at 545, 105 S.Ct. at 1495.

This led the Fifth Circuit Court of Appeals, in this case, to declare that no public employee is entitled to more than this minimal protection. This decision is

consistent with the court of appeals' decision in Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985), in which the court explained its position:

> The state's breach of its own procedures [granting greater than minimal protections] in the deprivation of a property interest rises to the level of a constitutional violation only when the state's actions do not comport with the process that would be required in the absence of the state statute. To hold otherwise would be to acknowledge a constitutional requirement of one due process for the citizens of Texas, another for the citizens of Louisiana, and yet another for the citizens of each state. We decline to make such a shambles of the Constitution's uniform grant of rights to all United States citizens. 756 F.2d at 1137 n.11.

Such sentiments, however, ignore the essential function of § 1983, which is to protect the various citizens of the nation in the exercise of their various states' extended liberties. See Zinermon v.

Burch, 494 U.S. 126, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990):

> In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law. It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 494 U.S. at 124, 110 S.Ct. at 982 (citing with approval Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); emphasis added).

To declare otherwise, and follow the Fifth Circuit's reasoning would be to ignore the fact that different states do have different statutes setting forth different

statutory schemes for the protection of its employees. For the Fifth Circuit to compel all public employees to bring their § 1983 claims down to the constitutional baseline would amount to the court's abrogation of § 1983; violation of the Tenth Amendment, which reserves to the states the right to set their own requirements for the qualification and removal of their employees; and disobedience to the rule of law which forbids federal courts' legislating state law.

42 U.S.C. § 1983, as seen above, protects the citizens of the states from the denial of their *state-created property rights* by state officials acting under color of state law. See Zinermon, *supra*; Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548

(1972)("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

Further, the states retain the power under the Tenth Amendment to define the nature of the employment relationship, in the qualifications and disabilities of their employees. See Gregory v. Ashcroft, 111 S.Ct. 2395 (1991):

> These cases stand in recognition of the authority of the people of the States to determine the qualifications of their most important government officials. It is an authority that lies at the heart of representative government. It is a power reserved to the States under the Tenth Amendment

> and guaranteed them by that provision of the Constitution under which the United States guarantees to every State in this Union a Republican Form of Government.
>
> * * *
>
> ...As against Congress' powers to regulate Commerce...among the several States, the authority of the people of the States to determine the qualifications of their government officials may be inviolate. Id. at 2402-2403 (citations and internal quotations omitted).

Accord Equal Employment Opportunity Commission v. Commonwealth of Massachusetts, 987 F.2d 64 (1st Cir. 1993)("No one disputes the proposition that the historic functions of regulating the relationship between the public employer and public employees have traditionally been left to the states.").

Thus, Louisiana has an overriding interest in the enforcement of La.R.S. 17:493's protections which cannot be trammeled by the Fifth Circuit Court of

Appeals in the manner expressed in the latter's decision in this case. La.R.S. 17:493 has been deemed to embody the public policy of the state, See Miller v. Rapides Parish School Board, 209 La. 877, 25 So.2d 623 (1946), and pursuant to subsection B of the statute, no secret or "executive" hearing regarding any disciplinary action may be conducted by the Board except with the consent of the operator. Additionally, La.R.S. 23:981 protects Faulk's union activities from the Board's predations:

> It is hereby declared to be the public policy of Louisiana that all persons shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist labor organizations or to refrain from any such activities. (Emphasis added.)

These statements of the law of Louisiana must be accepted unconditionally by the

federal courts. See International Woodworkers of America v. McCloud River Lumber Co., 119 F.Supp. 475, 486 (N.D.Cal. 1953)("The public policy of a State, as emphatically declared as it is in [La.R.S. 17:493 and 23:981], cannot be ignored by a Federal Court in a matter clearly within the ambit of State power."); See also Rehm v. Interstate Motor Freight System, 133 F.2d 154, 157 (6th Cir. 1943)("It is not the function of a Federal court either to legitimatize [sic], or to bastardize, the brain-child of state courts in diversity of citizenship cases. Since Erie R. Co. v. Tompkins,...the duty of United States courts in such cases is to ascertain, construe and apply static state law: not to limit, modify or repeal state doctrine."). Thus, the Fifth Circuit must accept state law as it is given to them;

the court of appeals was not free to whittle it down to a uniform, minimally constitutional standard more suited to rejecting states' citizens' rights under § 1983 than protecting them.

Accordingly, it is seen that the Fifth Circuit has read Loudermill far too broadly in its application to this and other cases. Loudermill properly stands only for the proposition that where state procedures are deficient, a minimal predeprivation hearing must be accorded a public employee before deprivation of protected employment status. The case does not stand for the proposition that no one is entitled to greater protections, as the state may provide.

In fact, if Louisiana's laws had been respected and implemented by the defendants, plaintiffs would not have

filed the instant lawsuit. But state officials did not implement the applicable state law. The refusal of the court of appeals to protect plaintiffs' property and liberty interests as created by state law, as it did, denies to plaintiffs the very remedy to which they are entitled under the provisions of 42 U.S.C. § 1983. That decision is also at war with Zinermon v. Burch, *supra*, where this Court stated:

> As was noted in *Monroe*, in many cases there is "no quarrel with the state laws on the books," id., at 176, 81 S.Ct., at 478; instead, the problem is the way those laws are or are not implemented by state officials. 494 U.S. at 125, 110 S.Ct. at 983 (emphasis added).

Similarly, plaintiffs' problem "is the way [applicable state laws were] not implemented by state officials." But in speaking to the purpose and scope of § 1983, the Monroe court held:

> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. 81 S.Ct. at 480 (emphasis added).

The court of appeals found that it did not need to reach this question because it considered that Mr. Faulk had received all the pre-deprivation process he was due. Court of Appeals Opinion, at 9-11. This conclusion is unconditionally contradicted by the deposition on file which unmistakably discloses that the School Board took premeditated action to deny Mr. Faulk's rights to a tenure hearing, and to fire him. The pretextual charges against

Mr. Faulk were admittedly false, without factual or policy support.

Specifically, when Mr. Faulk was suspended for allegedly having slapped a student, the court of appeals stated that the investigative hearing *stemming from the improperly weighted and composed investigative "team"* sufficed as all the process that was due to him. This conclusion ignores, and is further defeated by the undisputed facts that the School Board was required to honor Mr. Faulk's choice of an open tenure hearing under R.S. 17:493, but instead proceeded to conduct a secret hearing in his absence.

The Fifth Circuit merely engaged in an abstract discussion of the sufficiency or adequacy of any predeprivation hearing it believes occurred. Then plaintiffs

rights were tested not against the standard of predeprivation hearing mandated by state law, but against the lesser standard of predeprivation hearing evolved in Loudermill, *supra*. It is respectfully submitted that the rationale of the court in so interpreting the provisions of § 1983 turns the statute on its head. In short, the appellate court concluded that it would not enforce plaintiffs' state-created liberty and property interests, but would substitute the lesser standard of predeprivation hearing of the Fourteenth Amendment. This is an astonishing constitutional doctrine. It engages the court in refusing to recognize the laws of a state, enacted in the exercise of the reserved powers of that state under the Tenth Amendment, by refusing to protect citizens against the

willful conduct of state officials denying to the citizens the benefits of these laws.

It is undisputed that the School Board knew that Mr. Faulk had previously objected to a closed, executive session hearing because Dartez had admitted such in the School Board deposition. When the School Board then conducted a secret hearing in Faulk's absence over his known objection to such a hearing, it abused its power, obligation, and jurisdiction to hold the type of hearing required by positive state law and the state's public policy.

Thus, the court of appeals erroneously concluded that Mr. Faulk had received predeprivation due process, and did not reach the necessary and correct conclusion that the Zinermon analysis

should apply. Such decisionmaking cannot stand as the expression of federal justice, and the decision of the court of appeals must be reversed.

2. Mr. Faulk's speech, in his representative role as union president, concerning the School Board's statutorily-prohibited hiring practices which are harmful to the members of this essential, mandated class of public employees, is speech on a matter of public concern.

It must be recalled that this case was dismissed on defendants' motion for summary judgment, which placed the lower courts, when determining whether Faulk's speech was protected as touching on matters of public or private concern, in the position of examining his evidence in the light most favorable to his position, that his speech was protected. See McPherson v. Rankin, 786 F.2d 1291 (5th Cir. 1986), affirmed sub. nom. Rankin v.

McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987):

> We emphasize the procedural juncture of the instant case. Reading the record in the light most favorable to the party opposing summary judgment, we must conclude that the district court erred in granting summary judgment on the issue of whether the speech reached an issue of public concern. *See McPherson v. Rankin*, 736 F.2d 175 (5th Cir. 1984)(summary judgment inappropriate since motives and context were relevant to a determination of the protected status of the speech),... 786 F.2d at 1295.

Accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986):

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we

> suggest that the trial courts should act other than with caution in granting summary judgment... (Citation omitted.)

However, in this case both lower courts erred in determining that Faulk's speech was not on a matter of public concern, and rendered decisions conflicting with an analogous decision of the Ninth Circuit Court of Appeals, McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983) as to the protected status of public employee union activity. Further, the lower courts failed to consider graphic evidence of the documented public concern exemplified in numerous front-page local newspaper articles chronicling Faulk's travails with the School Board. This led the lower courts to conclude, in a vacuum, that Faulk's speech was not protected public speech within the meaning of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75

L.Ed.2d 708 (1983) and Rankin v. McPherson, *supra*.

Ignoring the fact that the Association's contract with the School Board *was the first ever*, and thus of great public concern in this context, the district court declared that the question of whether Faulk's speech was on a matter of public concern, and hence protected, or on a matter of private concern, and unprotected, was merely a matter of law for the court to determine:

> A determination of "public concern" is a question of law to be resolved by the court. This Court finds that Mr. Faulk's statements concerning the "substitute" drivers do not rise to the level of "public concern," as the speech in question was primarily concerned with Mr. Faulk's representation of the Vermilion Parish Bus Drivers' Association. Although, it may be inferred that the alleged retaliation by the School Board was directed at Mr. Faulk, as the Association's

> president, the statement about the "substitutes" was not sufficient to be deemed a matter of public concern. District Court Opinion at p.22 (citations omitted).

The court of appeals merely parroted this statement, without engaging in any of its own analysis of the issue. While this paraphrase of Connick v. Myers, *supra*, is partially correct, the method by which the court reached its conclusion was wholly incorrect.

The undisputed facts establish that the School Board is statutorily mandated to provide school bus transportation for its students. La.R.S. 158(A)(1). As such, the members of the Vermilion Parish Bus Drivers' and Operators Association comprise a class of necessary public employees. Their president, acting in his representative capacity, challenged the statutorily-prohibited School Board

practice of keeping "substitute" bus drivers on the public payroll for indeterminate periods of time exceeding ninety (90) days. See La.R.S. 500(C)(c) (1990). The Board's practices deflated the prevailing wage of the bus drivers, diluted the Association's membership because substitutes are ineligible for membership in the Association, and weakened the collective bargaining strength of this union representing this essential class of public employees. All of this came on the heels of the ratification of the first ever contract between the union and the School Board.

Incensed that an "uppity" bus driver would tell them to follow the law, the board members then set about casting for any excuse to sanction and silence Faulk

for telling this public body to follow the law.

Then, by denigrating these facts and ignoring record evidence, specifically the newspaper articles, both courts incorrectly felt justified in declaring that Faulk's speech, even though made by the president of a union for an entire class of necessary and statutorily-mandated public employees concerning its public contract bargaining position, was not on a matter of public concern.

However, in McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983), the Ninth Circuit explained why such matters do implicate matters of public concern:

> Plaintiff's speech dealt with the rate of compensation for members of the city's police force and, more generally, with the working relationship between the police union and elected city officials. First, compensation levels undoubtedly

> affect the ability of the city to attract and retain qualified police personnel, and the competency of the police force is surely a matter of great public concern. Second, the interrelationship between city management and its employees is closely connected with "discipline and morale in the workplace" - factors that are related to an agency's efficient performance of its duties." Connick, __ U.S. __, 103 S.Ct. at 1691....Third, the way in which an elected officail or his appointed surrogates deal with diverse and sometimes opposing viewpoints from within government is an important attribute of public service about which the members of society are entitled to know. Finally, plaintiff's speech was specifically and purposefully directed to the public both through city council meetings and a television interview. 705 F.2d at 1114-1115.

Accord Gray v. Lacke, 885 F.2d 399, 414 (7th Cir. 1989)("On prior occasions, courts have recognized that grievances submitted on behalf of other individuals

often touch upon matters of public concern.")(citing McKinley with approval).

Petitioners do not believe, even if Connick holds that characterizing public versus private speech has been deemed a legal question, that this determination can be made in a self-imposed vacuum of knowledge, or that documented public concern can be swept into a legal purgatory by judicial *fiat*.

However, this Court, in Connick and Rankin, *supra*, had already foreclosed such a possibility by requiring the courts to consider the entire context in which the speech was made, that its goals be analyzed, and that the role of its proponent be examined for personal or broader motivation. See Connick, 461 U.S. at 147-148, 103 S.Ct. at 1690-1691 ("Whether an employee's speech addresses a

matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.")(emphasis added, footnote omitted); Rankin, 483 U.S. at 384-386, 107 S.Ct. at 2897-2898. The lower courts' failure to complete this task by failing to consider the record evidence was therefore erroneous not only in the conclusion reached, but in the method used to reach that conclusion. The law cannot exist in isolation from the realities to which it is designed to apply.

It cannot be denied that where the School Board acts venomously toward those who succeed in obtaining a bargained contract between a union and its public employer, in pursuit of the union members' rights under the declared public policy of the State of Louisiana protecting those

who engage in union activities, La.R.S. 23:981, that such action, and the speech challenging adverse action are matters of public concern. This contract was the first ever between these parties. So when the Board set about undermining that contract, and attacking the union's president for challenging that action, it becomes a matter of public concern to all who would do business with the School Board. They wonder if they will be similarly treated. Should they even enter into contracts with this public entity that does not keep its word? How will this affect the ability of the public to obtain service from this agency or of the agency to contract for services with others?

These are the concerns succinctly recognized by the McKinley court. Of

course such actions implicate public concerns, because they demonstrate how the Board members are fulfulling their responsibilities to provide the best and safest transportation to the children depending upon it. But the School Board's actions in this case cast doubt on its members' ability to function. All of these reasons show why this controversy has been the subject of repeated newspaper interest.

Both lower courts failed to recognize these implications, and therefore failed to properly analyze this issue. Furthermore, they failed to draw these favorable inferences in favor of Mr. Faulk and the Association, under the strictures of summary judgment analysis. These errors must be corrected, and the Fifth Circuit's faulty "analysis" of the

protected status of union activity speech must be conformed to that of the Ninth Circuit.

3. The court of appeals failed to comprehend that the denial of Petitioners' First Amendment rights included the denial of their right of access to the courts where defendant, Woodruff threatened Faulk with termination if he attempted to vindicate his rights.

Where the court of appeals declared that there was no denial of Mr. Faulk's First Amendment free speech rights, Opinion, at 11-13, it did so on the basis that Mr. Faulk's speech could not be characterized as protected public speech. Petitioners do not concede this point, as above, but show that a retaliatory discharge is only one aspect of the First Amendment rights violations visited upon your Petitioners.

The other rights violation visited upon your Petitioners concerns defendants' attempt to deny Mr. Faulk of his right of access to the courts, a substantive right protected by the First Amendment. Woodruff actually threatened Faulk with termination if he did not acquiesce in the illegal actions of the School Board suspending him for allegedly slapping the student, Randy Baldridge.

The Fifth Circuit Court of Appeals affirmed the district court's dismissal of Mr. Faulk's claims against defendants by paraphrasing the decision of, and concluding, as did the district court, that there was no record evidence introduced to defeat defendants' Motion for Summary Judgment. On page 14, of the court of appeals' opinion, it was declared that "[i]n opposing a motion for summary

judgment, 'an adverse party may not rest upon the mere allegations or denials of his pleading, but by his response by affidavits or as otherwise provided in (Fed. R. Civ. P. 56), must set forth specific facts showing there is a genuine issue for trial.'"

However, both lower courts must have overlooked the affidavit of J. Isaac Funderburk, in order to make this statement. It was affirmatively set forth in Mr. Funderburk's affidavit, which bears the stamp of the district court clerk in its upper lefthand corner:

> 2) That after the Board imposed a ten (10) day suspension upon Faulk in connection with the alleged corporal punishment, he (Funderburk) was told by the Board's counsel, Calvin "Woody" Woodruff that if Faulk did not take the suspension, he would be inviting a removal hearing pursuant to LSA-R.S. 17:493.

In failing to recognize this First Amendment violation, the Fifth Circuit Court of Appeals ignored its own seminal opinion on the substantive nature of the right of access to the courts:

> The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907), the Supreme Court characterized this right of access in the following terms:
>
> > The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to [its] citizens....
>
> * * * * *
>
> This court recognized the first amendment right of access to the courts in *Wilson v. Thompson*, 503 F.2d 1375 (5th

> Cir. 1979), where we stated: "It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances."
>
> * * * * *
>
> A third constitutional basis for the right of access to the courts is found in the due process clause.
>
> * * * * *
>
> A mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." Interference with the right of access to the courts gives rise to a claim for relief under section 1983....

Ryland v. Shapiro, 708 F.2d 967, 971-972 (5th Cir. 1983)(citations omitted, emphasis added).

Where Woodruff threatened Mr. Faulk with even more adverse action, his termination, if he did not accept the suspension illegally imposed upon him as a result of the alleged slapping incident, Woodruff committed a criminal act of

extortion, See La.R.S. 14:66, in an attempt to threaten Mr. Faulk into silence and to prevent him from seeking redress in the courts.

This without more was a violation of Mr. Faulk's First Amendment right. See Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986), where the court was confronted with defendants who sought to expropriate the plaintiff's blueberry farm after plaintiff sued them to stop unlawful sewerage outflows from a treatment facility. In condemning this action, the court stated:

> An individual's constitutional right of access to the courts cannot be impaired, either directly or indirectly, by threatening or harassing an individual in retaliation for filing lawsuits. It is not necessary that the individual succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the

> individual's right of access. The cases from this Circuit, as well as from others, make it clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. An act taken in retaliation for the exercise of a constitutionally protected right is actionable under §1983 even if the act, when taken for a different reason, would have been proper. An individual is entitled to free and unhampered access to the courts. Id. at 1427-1428 (citations and internal quotations omitted, emphasis added).

See also Bradley v. Pittsburgh Board of Education, 910 F.2d 1172, 1177 (3rd Cir. 1990)(collecting cases).

Thus, defendants can take no refuge in arguing that Mr. Faulk's right to appeal his suspension was adequately provided for where they, through their attorney Woodruff, attempted to deny his

right of access to the courts altogether. See Funderburk Affidavit. Such action is undeniably a First Amendment violation, which the court of appeals utterly failed to address, through the combined errors of failing to consider the record evidence, and in failing to consider the First Amendment claims fully raised in Mr. Faulk's petition.

The courts also overlooked the affidavit of Mr. Faulk himself, in which Faulk describes the animus motivating the School Board's actions against him in paragraphs 5, 6, 7, 8, and 9. Additionally, the deposition of the Vermilion Parish School Board was introduced into the record, in which Superintendent Dartez admitted defendant Woodruff's knowing involvement in the

illegal actions taken against Faulk and the Association.

Parenthetically, it must be noted that the district court's gratuitous characterization of Mr. Faulk's claims against Woodruff, as being "loosely based" upon a theory of § 1983 liability stemming from a conspiracy between a private citizen and state actors, misses the mark. But, it is the necessary product of the district court's failure to consider Mr. Funderburk's affidavit. Had the district court considered that affidavit, it would have realized that that document set forth facts showing that Woodruff's actions amounted not only to a conspiracy, but an independent violation of Mr. Faulk's substantive First Amendment right of access to the courts. Woodruff, a Vermilion Parish Assistant District

Attorney, was himself a state actor, acting on behalf of the School Board pursuant to La.R.S. 16:2(A). Thus, no "conspiracy" need be alleged to find Woodruff liable for violating Petitioners' rights under § 1983.

In overlooking the record evidence, both courts further violated their affirmative duties to fully and independently consider the record on this appeal of a summary judgment, and thereby denied Petitioners of due process in the consideration of their claims against defendants. These errors cannot go without correction, and amount to a gross departure from proper judicial proceedings. This practice also conflicts with the decisional law of other circuits requiring courts to examine the *entire*

record, not just that evidence that may have been "marked in red."

Unfortunately, this Honorable Court has yet to set forth the scope of a federal court's obligation to consider the record when handling a summary judgment motion pursuant to Fed. Rule Civ. P. 56(c), which contains no apparent limitation on the courts' duty to examine "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."

Mr. Faulk believed that under the standard enounced in Higgenbotham v. Ochsner Foundation Hospital, 607 F.2d 653, 656 n.3 (5th Cir. 1979)(courts are not permitted to ignore record evidence in a record that is not voluminous), the court of appeals would correct the district court's errors. See also John v. State of

Louisiana Board of Trustees for State Colleges and Universities, 757 F.2d 698, 711-712 (5th Cir. 1985)(court similarly admonished district courts not to shirk their duty to fully examine record evidence); Harkins Amusement Enterprises, Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988)(a "complex" antitrust case); Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 930 (1st Cir. 1983)("...we find the principle attractive.").

Other circuit courts of appeals, however, do not permit the perceived size of a record to limit the scope of examination. This is undoubtedly due to the standardless determination a court would make in deeming a record "complex" or "voluminous," and the lack of any such concept in Rule 56. See Ottensmeyer v.

Chesapeake & Potomac Telephone Company of Maryland, 756 F.2d 986 (4th Cir. 1985)("The appellate court must search the record...)(Emphasis added); Brock v. American Postal Workers Union, Chicago Local, 815 F.2d 466, 469 (7th Cir. 1987)("...the reviewing court must consider the entire record...")(Emphasis added); Accord Glass v. Dachel, 2 F.3d 733, 739 (7th Cir. 1993)(citing Higgenbotham with approval); See also Tippens v. Celotex Corp., 805 F.2d 949, 952 (11th Cir. 1986):

> The District Court shall consider all evidence in the record when reviewing a motion for summary judgment - pleadings, deposition, interrogatories, affidavits, etc. - and can only grant summary judgment 'if *everything* in the record...demonstrates that no genuine issue of material fact exists.' 'Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of

> overkill in its use.' (Italics in original, citations omitted).

Other decisions indicate that a conflict may exist even within the Fifth and the Eleventh Circuits as a result of the 1981 division of these circuits and the Eleventh Circuit's adoption of the former Fifth Circuit's precedents through Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981). See John v. State of Louisiana, *supra*, at 712 ("Again, we need not attempt to reconcile the apparent conflict or make a choice between conflicting rules, if indeed there is a conflict at all."); Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1033 n.7 (5th Cir., Unit B, 1982)(A "[f]ormer Fifth Circuit case" arising in the Southern District of Florida).

Mr. Faulk respectfully requests that this Honorable Court approve or condemn either of these standards, or set forth one consistent standard, rather than join the lower courts and the defendants in denying Petitioners of their rights to due process by perpetuating the district court's myth of missing evidence.

Mr. Faulk further submits that even if the Fifth or Ninth Circuit standards are correct, that the record in this case was not sufficiently "voluminous" to permit the district court to fail to recognize and consider the evidence he produced. This is not a case in which a court could not find the evidence, rather this is a case in which the court "warned" plaintiff against eliciting evidence. Recall the district court's announced

reluctance to even permit Mr Faulk to assert a claim against Woodruff.

In another instance, however, the Fifth Circuit has recognized that district court reluctance to examine a record should result *in a more thorough examination* of the record. See Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 n.8 (5th Cir. 1980):

> We place special emphasis on this point in light of certain of the court's comments at the pretrial conference. Referring to a motion to dismiss a party for lack of jurisdiction, the court said: I'm not going to go through a bunch of depositions to try to find out what the situation is. I'm going to decide it on the papers relating to the motion.

Recall Judge Doherty's announced declaration, even before the petition was amended and evidence adduced, that she doubted naming Woodruff as a defendant would serve "the ends of justice,"

whereupon she stated her intention to sanction undersigned counsel if no evidence was produced. Perhaps unsurprisingly, she found no such evidence despite its presence in the record, as shown by the clerk of court's stamp at the top of Funderburk's affidavit. Your petitioners' astonishment increased when the court of appeals uncritically paraphrased the district court's written reasons for judgment and affirmed its ruling on this point.

Petitioners now must seek either a writ of certiorari or a writ of mandamus to correct these errors. They were unable to do so in the court of appeals because a complaint of judicial misconduct, like an application for a writ of mandamus, may not be used to obtain relief from an appealable order. Duckworth v. Department

of Navy, 974 F.2d 1140, 1141 (9th Cir. 1992); Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33, 34-35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). This rule presupposes, however, that the appellate court will recognize and correct such errors of the district court. Now that the Fifth Circuit has failed to do so in this case, either or both of the writs sought here must issue so that the record evidence can be considered in light of applicable law.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari and/or writ of mandamus issue herein, that upon due consideration, the judgment of the court of appeals rendered on April 28, 1994, be duly reversed, reversing the summary judgment rendered by

the district court, and remanding this case for trial on the merits, or alternatively, that the lower court(s) be ordered to reconsider the case in light of the evidence and applicable Louisiana law, in an authored opinion, in which case this Honorable Court will address itself to the lower courts on the standard of record review incumbent upon the lower courts.

Respectfully submitted,

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